



Australian
Human Rights
Commission

everyone, everywhere, everyday

Proposed Wild Rivers Declarations

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Australian Human Rights Commission

Submission by the Aboriginal and Torres Strait
Islander Social Justice Commissioner to the
Minister for Natural Resources and Water

November 2008

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Minister for Natural Resources and Water for the proposed Archer Basin Wild River Declaration, the Lockhart Basin Wild River Declaration and the Stewart Basin Wild River Declaration.

2 Summary

2. The Commission supports the Governments efforts to ensure the protection and maintenance of specific rivers and their connected waterways In Queensland through the *Wild Rivers Act 2005* (Wild Rivers Act).
3. While this submission is related specifically to the proposed declarations for the Archer, Lockhart and Stewart River Basins, this submission provides discussion that will also be relevant to future declarations made under the Wild Rivers Act.
4. The Commission notes that Indigenous peoples of the Archer, Lockhart and Stewart River Basins disagree with the term 'wild rivers'. They argue that the term is culturally inappropriate and implies that the land and waters in a proposed declaration were uninhabited and predominantly void of human activity. The use of the term 'wild' does not equate with Indigenous peoples' perspectives and their continuing use of the rivers. For the purposes of this submission, the Commission will refer to the 'proposed wild rivers declarations' as simply the 'proposed declarations'.
5. The Commission is concerned that declarations made over the rivers and their interconnected waterways, may affect the exercise and enjoyment of Indigenous peoples human rights, in particular, those related to the access, use and occupancy, management and conservation, cultural and development rights to their lands, waters and natural resources.
6. The Commission understands that the Indigenous peoples of the Archer, Lockhart and Stewart River Basins generally agree with the prevention of surface mining and intensive animal husbandry in proximity to a river, restrictions on major water extraction and prevention of in-stream dams.¹ However, the Commission also acknowledges that traditional owners are concerned that the rivers are currently inadequately managed and protected.
7. The Commission notes that the proposed declarations under the Wild Rivers Act make provision for an Indigenous water reserve in accordance with s 27 of the *Cape York Peninsula Heritage Act 2007*, for the purpose of helping Indigenous communities in the area achieve their economic and social aspirations.²

¹ Balkanu Aboriginal Development Corporation, *Telephone Communication with Terry Piper*, 17 November 2008.

² *Wild Rivers Act 2005*, s 27(2)

8. However, the Commission is concerned that the legislation and proposed declarations do not consider the cultural value of the rivers and their interconnected waterways to Indigenous peoples. The Commission is of the view that the protection of wild rivers must include recognition of Aboriginal title and the active participation of Traditional Owners and Indigenous communities.
9. The Commission is concerned about the increasing imposition of legislative and policy arrangements on Indigenous peoples without providing adequate information about the relationships and interaction between these arrangements. The Commission is also concerned that without effective communication between relevant departments responsible for implementation of government processes, the rights of Indigenous peoples may be compromised.

3 Recommendations

10. The Australian Human Rights Commission recommends that:
 - a) proposed declarations are declared only on the basis that they address, recognise and implement Indigenous cultural values in a substantial way.
 - b) all declarations be informed by the principles contained in the International mechanisms and the research conducted by the Australian Government on the provision of Indigenous peoples cultural values in water.
 - c) prior to a declaration being made, traditional owners whose rights and interests may be affected by a proposed declaration are provided complete and clear information which outlines both the benefits and the extent to which their rights will be restricted or impacted upon.
 - d) in accordance with section 17 of the Wild Rivers Act,³ no declarations be made that impact upon Indigenous peoples' rights and interests that are already protected under the *Aboriginal Land Act 1991*, the *Native Title Act 1993* (Cth), the *Aboriginal Cultural Heritage Act 2003*, and the *Nature Conservation Act 1992* (Qld).
 - e) those rights and interests that have already been recognised or granted are not limited by the implementation of the Wild Rivers Act and declarations made in accordance with it.
 - f) in the implementation of the Wild Rivers Act and the development of any proposed declaration, the Government ensures as a minimum standard:
 - a. the effective participation of Indigenous peoples in the development of policies that affect Indigenous peoples' lands and waters

³ Wild Rivers Act 2005, s 17, validates carrying out existing activities and the taking of natural resources that are authorised or permitted by a licence, permit, or approval document held by the person under another Act or law.

- b. the adoption of and compliance with the principle of free, prior, and informed consent of Indigenous peoples for proposals on their lands and waters
 - c. evidence based policy with built in evaluation mechanisms
 - d. that legislative developments do not remove or restrict existing rights
 - e. non-discrimination and substantive equality.
- g) there be Indigenous involvement in the drafting and development of the proposed declarations, and that the Government build strong partnerships with Indigenous peoples for the joint management of the declared rivers.
- h) the Government assure the long term resourcing for the management of Wild Rivers. This must include funding for full time Indigenous rangers and co-coordinators to manage the waters and lands, and also provide for the necessary infrastructure, capacity building and training required to support the management of the rivers.
- i) the Government fully recognise the significance of the River Basins to the Traditional Owners whose lands lie within the Archer, Stewart and Lockhart River Basins.
- j) the Government take this opportunity to incorporate Indigenous peoples distinct rights to water, the environment, economic development and participation and engagement into the proposed Archer, Stewart and Lockhart River Basin declarations.

4 The Traditional Owners of the Archer, Lockhart and Stewart River Basins

11. Indigenous peoples are connected to and responsible for their traditional land and waters and in turn Indigenous peoples obtain and maintain their spiritual and cultural identity, life and livelihood from their lands and waters.
12. The Archer, Lockhart and Stewart River Basins are home to a number of Indigenous Traditional Owner groups including Northern and Southern Kannju, Wik Mungkan, Apalach, Wintchnum, Olkola, Kuuku-Y'au, Umpila, Kuntanumpu, Ultahganu, Lama Lama, Kuuku-Yani, Ayapathu and Umbindamu.
13. These traditional owner groups currently engage with a number of legislative and policy arrangements, at the Commonwealth, State and local levels. These arrangements include native title, land rights, and cultural heritage.
14. While these traditional owner groups are independently identified based on their inherent cultural diversity and their traditions, sites, stories and cultural practices; they all share similar concerns and aspirations relating to the proposed declarations of rivers under the Wild Rivers Act.
15. The Indigenous peoples of the Archer, Lockhart and Stewart River Basins possess distinct cultural and customary rights and responsibilities including: a

spiritual connection to the lands, waters and natural resources of the rivers; management of significant sites located along the river banks, on and in the river beds, and sites and stories associated with the water and natural resources located in the rivers and their tributaries; protection of Indigenous cultural heritage and knowledge; accessing cultural activities such as hunting and fishing, and ceremony.

16. The Indigenous peoples of the Archer, Lockhart and Stewart River Basins have an obligation under their traditional law and custom to protect, conserve, and maintain the environment and the ecosystems in their natural state to ensure the sustainability of the whole environment.
17. Historically Indigenous peoples have been excluded from water management. There are low levels of awareness among Indigenous peoples of water institutions and regulation.⁴ Indigenous Australians have had little to no involvement in state consultation processes regarding water, including the development of Wild River policy and legislation. This has resulted in a limited capacity to negotiate enforceable rights⁵ and means that there is the potential for the rights of Indigenous people to be limited by the proposed declarations.
18. The Commission is concerned about the impact of the declarations on Indigenous peoples rights and interests particularly cultural values, land and water management, and native title rights and interests. Additionally we are concerned that the implementation of this legislation may limit the rights of the Indigenous groups of the Archer, Lockhart and Stewart River Basins to access, care for and manage their lands and waters, and their rights to use their lands and water to achieve economic independence.

4.1 Indigenous peoples' human rights

19. Indigenous peoples' special connection to land and waters is protected under international law which provides for the right to practice, revitalise, teach and develop culture, customs and spiritual practices and to utilise natural resources.⁶
20. Australia has ratified a number of international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention of the Elimination of all forms of Racial Discrimination (CERD). These create an obligation to ensure the full and equal enjoyment

⁴ S Jackson, (CSIRO), *Indigenous Interests and the National Water Initiative Water Management, Reform and Implementation Background Paper and Literature Review*, (2007), pp 65-6. At http://www.nailsma.org.au/nailsma/publications/downloads/NAILSMA_NWI_Review_UPDATEDec07.pdf (viewed 26 July 2008).

⁵ M Durette, *Indigenous Legal Rights to Freshwater: Australia in the International Context*, (2008) Centre for Aboriginal Economic Policy Research Working Paper No. 42/2008, p vii. At <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP42.pdf> (viewed 28 August 2008).

⁶ See International Covenant on Civil and Political Rights, arts 1, 27; International Covenant on Economic, Social and Cultural Rights, arts 1,15; Declaration on the Rights of Indigenous Peoples, arts 11-13, 26-31.

and exercise of these human rights for its citizens, including Indigenous peoples.⁷

21. The Committee on the Elimination of Racial Discrimination has, for example, highlighted that the obligation to not discriminate on the basis of race requires that governments:
- Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
 - Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
 - Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages;⁸ and
 - recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources...⁹
22. In addition, as Indigenous peoples, the traditional owners of the Archer, Lockhart and Stewart River Basins hold a special status as the first peoples of the lands and waters. As such, they possess a number of distinct rights that relate to their lands, waters, and natural resources; self determination; and engagement and participation in government processes that directly or indirectly impact on their lives.
23. The following internationally recognised rights are particularly relevant to Indigenous peoples and the proposed Archer, Lockhart and Stewart River Basin declarations under the Wild Rivers Act:

(a) *The right to water*

24. The right to water is a human right that is protected in a wide range of international instruments, including the ICESCR, ICCPR and the Declaration on the Rights of Indigenous Peoples.¹⁰ The ICESCR provides an implicit right to water, recognising that it contributes to achieving an adequate standard of living and the right to enjoyment of the highest attainable standard of physical

⁷ While a breach of these obligations is ultimately the responsibility of the Commonwealth government, being the government that has the international legal personality to enter into treaty obligations, it is clear that the laws of state and territory governments can put Australia in breach of those obligations: see art 50 of the ICCPR and art 28 of the ICESCR. It may be noted that the Australian Government can seek to protect against breaches of human rights obligations by legislating to override state laws: see, for example, *Commonwealth v Tasmania* (1983) 158 CLR 1.

⁸ United Nations Committee on the Elimination of Racial Discrimination, General Comment 23: Indigenous Peoples, UN Doc: A/52/18, annex V, 18 August 1997, para 4.

⁹ United Nations Committee on the Elimination of Racial Discrimination, General Comment 23: Indigenous Peoples, UN Doc: A/52/18, annex V, 18 August 1997, para 5.

¹⁰ Office of the United Nations High Commissioner for Human Rights, *Right to Water*. At <http://www.unhchr.ch/html/menu2/6/water/index.htm>, (viewed 3 October 2008).

and mental health. The ICESCR and the ICCPR also recognises people's right to freely dispose of their own natural resources where in no case can 'a people be deprived of its own means of subsistence.'

'The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.'¹¹ There is a fundamental link between accessing water and living in dignity which means that the human right to water is receiving increased attention and recognition both in Australia and worldwide.¹² The right to water is linked to many other rights including the right to food, the right to health and the right to take part in cultural life.¹³

The Declaration on the Rights of Indigenous Peoples further supports Indigenous people's rights to access, conservation and economic development of water. It provides that Indigenous peoples have a right to maintain and strengthen the distinctive Indigenous spiritual relationship with 'traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas.' It also provides that Indigenous peoples have the right to conservation and protection of Indigenous lands and resources with state assistance and the right to development for all Indigenous lands and resources including water.

(b) Cultural rights and the cultural use of water

25. Indigenous peoples' special spiritual and cultural relationships with water are holistic; combining land, water, culture, society and economy. Consequently water, land rights and native title are inseparable.
26. Indigenous peoples' right to fully enjoy their culture and to take part in cultural life is recognised in several international instruments as discussed above.
27. The United Nations Declaration on the Rights of Indigenous Peoples provides that Indigenous peoples have a right to maintain and strengthen the distinctive Indigenous spiritual relationship with 'traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas.'¹⁴

¹¹ Committee on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002). At: <http://daccessdds.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf?OpenElement> (viewed 9 October 2008). See also Substantive Issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights General Comment No. 14 (2000). The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights). At [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument) (viewed 9 October 2008).

¹² Office of the United Nations High Commissioner for Human Rights, *Right to Water*. At <http://www.unhchr.ch/html/menu2/6/water/index.htm> (viewed 3 October 2008). See also J Gray and J Nolan, Editorial, (2008) *Human Rights Defender*, 17 (1) 1, p 1.

¹³ Office of the United Nations High Commissioner for Human Rights, *Right to Water*. At <http://www.unhchr.ch/html/menu2/6/water/index.htm> (viewed 3 October 2008).

¹⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, Arts 25.

28. Not only is water significant to the spiritual values of Indigenous peoples, water is vital for cultural and economic development. It is not possible to separate water from Indigenous culture and it is also not possible to separate cultural and spiritual water rights from economic development.¹⁵ However in general, Indigenous water rights have been allocated through a narrow cultural or social lens with other rights such as economic and environmental water rights being excluded.
29. Indigenous peoples in other parts of the country have identified that the difference between environmental and cultural water is that it must be the Indigenous peoples themselves deciding where and when water should be delivered based on traditional knowledge and their aspirations. This ensures Indigenous peoples are empowered to fulfil their responsibilities to care for country.¹⁶
30. The impacts and benefits of cultural water to Indigenous peoples include:
 - empowerment and social justice - water is being delivered to country by the peoples
 - growing native plants
 - protecting and hunting animals
 - song, dance, art and ceremony
 - spiritual sites
 - improved cultural-economic and health outcome through the provision of food, medicines and materials for art.¹⁷

(c) *The right to a healthy environment*

31. Environmental rights include the rights of access to the unspoiled natural resources that enable survival such as land, shelter, food, water and air; the right to refuse development; and specific environment-related rights of Indigenous peoples.
32. Environmental rights are provided for by international instruments including the Convention on Biological Diversity¹⁸, the Rio Declaration¹⁹ and Agenda 21²⁰.

¹⁵ As identified in Agenda 21 access to and supply of water is vital to economic development *Agenda 21*, Chapter 18.6. At <http://www.un.org/esa/sustdev/documents/agenda21/index.htm> (viewed 8 October 2008).

¹⁶ Murray Lower Darling Rivers Indigenous Nations, *Cultural Flows*, undated.

¹⁷ Murray Lower Darling Rivers Indigenous Nations, *Cultural Flows*, undated.

¹⁸ Australia ratified the Convention on Biological Diversity in June 1993. The Convention came into force in December 1993.

¹⁹ Australia was one of the 178 countries participating in the UN sponsored conference on Environment and Development held in Rio de Janeiro in 1992. That conference formulated the Rio Declaration on Environment and Development, a statement of 27 principles directed towards promoting sustainable development, including the protection of the environment. At <http://www.aph.gov.au/library/pubs/RN/1997-98/98rn04.htm>, (viewed 25 November 2008).

²⁰ *Agenda 21* was adopted by more than 178 Governments, including Australia, at the UN Conference on Environment and Development in 1992. At <http://www.un.org/esa/sustdev/documents/agenda21/index.htm>, (viewed 4 November 2008).

33. The Rio Declaration recognises the vital role of Indigenous communities' knowledge and traditional practices in environmental management.
34. Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organisations of the United Nations, governments, and major groups in every area where there are human impacts on the environment. It provides for the protection and management of freshwater resources recognising the effects that climate change will have on water and Indigenous peoples.²¹ Agenda 21 identifies the need to engage Indigenous people in water management policy-making and decision-making; improve Indigenous technologies to fully utilise limited water resources and to safeguard those resources against pollution; recognise the interconnection between economic development and access and supply of water.²²
35. The Convention on Biological Diversity's objective is to sustain all life on earth, including aquatic ecosystems, with the global goal to reverse and stop the loss of biodiversity. The Convention on Biological Diversity provides for the respect, preservation and maintenance of knowledge, innovations and practices of Indigenous and local communities relevant for the conservation and sustainable use of biological diversity.²³ Many of the decisions of the COP call for the full and effective participation of Indigenous communities in order to achieve the global goal.²⁴

(d) *A right to economic development*

36. The ICESCR and the Declaration on the Rights of Indigenous Peoples provide for Indigenous peoples to access and use their lands, waters and natural resources for economic development and building sustainable communities.
37. The United Nations Declaration on the Rights of Indigenous Peoples supports Indigenous economic development through the use of water resources. In particular it provides that Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and our resources. It states that:

States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water, or other resources.²⁵

²¹ *Agenda 21*, Chapters 18 and 26. Chapter 26 specifically relates to recognising and strengthening the role of Indigenous People and their Communities. At

<http://www.un.org/esa/sustdev/documents/agenda21/index.htm>, (viewed 4 November 2008).

²² *Agenda 21*, Chapter 18. At <http://www.un.org/esa/sustdev/documents/agenda21/index.htm>, (viewed 4 November 2008).

²³ Convention on Biological Diversity, Art 8(j).

²⁴ See for example Conference of the Parties to the Biodiversity Convention, *Marine and coastal biological diversity*, COP 9 Decision IX/20, Bonn, 19 - 30 May 2008. At <http://www.cbd.int/decisions/?m=COP-09&id=11663&lg=0> (viewed 1 September 2008).

²⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, Arts 32.

5 Submission in relation to the Wild Rivers nominations of the Archer, Lockhart and Stewart Rivers

38. The Commission's particular concerns with the proposed declarations are addressed below. The Commission notes that these concerns also relate to the implementation of the Wild Rivers Act generally.

5.1 Cultural values of the Archer, Lockhart and Stewart River Basins

39. Indigenous barrister Anthony McAvoy argues that to date 'there is no place in modern river management systems for the protection of Indigenous spiritual values.'²⁶ This special ancient and ongoing spiritual and cultural connection to water has in most cases been ignored by non-Indigenous water laws.
40. Cultural water use is part of Indigenous law and there are potential risks to Indigenous cultural and spiritual values when water is used for non-Indigenous economic, development, recreational or domestic purposes. According to Indigenous law water places have special spiritual significance and accompanying cultural responsibilities.
41. The stated purpose of the *Wild Rivers Act 2005* is 'to preserve the natural values of rivers that have all, or almost all, of their natural values intact.'²⁷
42. The Commission acknowledges that it is extremely important to recognise and protect the natural values of the rivers. The Commission is concerned that the proposed declarations under the Wild Rivers Act do not adequately recognise the Indigenous cultural values in the Archer, Lockhart and Stewart River Basins and do not give any indication of how these are to be managed.
43. The long-term Indigenous occupation and management of lands and waters within the Archer, Lockhart and Stewart River Basins has resulted in significant cultural value to the Indigenous peoples of those lands and waters, and that those cultural values form part of the natural value of the rivers and their interconnected waterways.
44. The Commission argues that any declarations made under the Wild Rivers Act must be developed and implemented in accordance with the Nature Conservation Act which provides that management principles of national parks must be managed to provide, to the greatest possible extent, for the permanent preservation of the area's natural condition and the protection and presentation of the area's cultural resources and values.²⁸

²⁶ K Barber and H Rumley, *Gunanurang: (Kununurra) Big River: Aboriginal Cultural Values of the Ord River and Wetlands*, A study and report prepared for the Waters and Rivers Commission WA, (2003), p14. At

http://portal.water.wa.gov.au/portal/page/portal/WaterManagement/Groundwater/Ord/Content/ABORIGINAL_VALUES.pdf (viewed 10 September 2008).

²⁷ *Wild Rivers Act 2005*, s 3.

²⁸ Nature Conservation Act, 1992 (Qld), s

45. **The Commission recommends** that Indigenous cultural values must be considered by the Act and addressed in declarations, and must not be regarded as mutually exclusive to the natural values as outlined in the proposed declarations.
46. The Commission is concerned that the Wild Rivers legislation will impact upon Indigenous peoples rights to enjoy and practice a living and ongoing culture especially as many important cultural sites are situated in or in near proximity of the rivers. For example elders across the region have voiced their concerns in various consultations that their burial, birth and other culturally and spiritually important sites located on the rivers will not be protected by the declarations.
47. One way in which the cultural values of Indigenous peoples may be acknowledged is through formal recognition given to the particular traditional owner groups whose land and waters lie within the specific proposed declaration areas, by naming them and providing information about the cultural value of the declared area in the declaration.
48. The Australian Government recently conducted a research project with the Anmatyerr people in the Northern Territory which consider the provision for cultural values in water management.²⁹ They identified five overarching categories or key elements of cultural water values:
1. Law
 2. Responsibilities and Protocols
 3. Economies, Environment and Education
 4. Recreation and Well Being
 5. History of People and Place

The project also identified five overarching ways to provide for these values:

- Water Allocation
 - Use of Indigenous Names and Protocols
 - Access, Land Management and Co-existence
 - Livelihoods and Skills Exchange
 - Governance and Participation.³⁰
49. **The Commission recommends** that proposed declarations are declared only on the basis that they address, recognise and implement Indigenous cultural values in a substantial way.
50. **The Commission further recommends** that all declarations be informed by the relevant principles contained in International mechanisms and the

²⁹ Dr N Rea and the Anmatyerr Water Project Team, *Provision for Cultural Values in Water Management: The Anmatyerr Story*, Land & Water Australia Final Report, (2008). At <http://products.lwa.gov.au/products/PR081464> (viewed 10 September 2008).

³⁰ Australian Government, Land and Water Australia, *Provision for Cultural Values in Water Management: The Anmatyerr Story*. At http://sirp.gov.au/Research/The_Provision_for_Cultural_Values_in_Water_Management_The_Anmatyerr_Story/indexdl_8963.aspx. (viewed, 19 November 2008).

5.2 Proposed Declarations under the Wild Rivers Act 2005

(a) Relationship with other Acts

51. The Commission notes that the proposed rivers are located on lands and waters where there are significant Indigenous interests across a variety of tenure arrangements including, native title, land rights, national parks, and Indigenous freehold.
 52. The Commission is concerned that Indigenous peoples are being forced to engage with a number of legislative arrangements, many of which are extremely complex. This is compounded by the overlap with other state and commonwealth legislative and policy areas.
 53. The Commission is concerned about the impact of the proposed declarations under the Wild Rivers Act on the capacity for Indigenous peoples to fully exercise and enjoy their rights to their lands and waters obtained through the *Native Title Act 1993* (Cth), and the *Cape York Peninsula Heritage Act 2007*, *Aboriginal Cultural Heritage Act 2003*, *Aboriginal Land Act 1991*, the *Nature Conservation Act 1992* (Qld), and other relevant legislative and policy arrangements.
- (i) Cape York Peninsula Heritage Act 2007*
54. In particular, the Commission is concerned that the relationship between the Wild Rivers Act and the Cape York Peninsula Heritage Act is unclear.
 55. The *Cape York Peninsula Heritage Act 2007* provides for the joint management of national parks. Joint management arrangements are negotiated through an Indigenous Management Agreement (IMA). Traditional owners of Archer, Stewart River Basins, have either completed or are currently negotiating IMAs under the Cape York Peninsula Heritage Act. IMAs outline the cultural, social, economic and environmental activities that traditional owners seek to undertake on lands that have been declared National Parks. However, there are significant concerns that these activities will be restricted by the proposed declarations under the Wild Rivers Act.
 56. The Queensland Government assert that a declaration under the Wild Rivers Act may affect the management plan (or IMA) for a national park within the proposed area. The Wild Rivers Act provides that a park's management plan must be consistent with the declaration or provide a greater level of protection for the area.
 57. Legislation governing National Parks already provides a high level of protection and conservation of the natural values over the lands and waters within the park boundaries. National Parks could be exempted from the proposed declaration areas.

58. The Queensland Government assert that a declaration under the Wild Rivers Act will have no impact on traditional owners' participation in the development of national park management plans.³¹
59. However, the Commission is concerned that where joint management applies and IMA's and proposed declarations are being developed without an integrated cooperative process, Indigenous stakeholders are not receiving adequate advice as to whether the agreements they are entering into are in accordance with all relevant legislation. This may result in inconsistency between the declaration and the IMA, making the IMA partially invalid.
60. As there is no guidance in the *Wild Rivers Act 2005* of the interaction of the Wild River Act with National Parks or IMAs, the Commission is concerned that a declaration may reduce the capacity of Indigenous peoples to fully realise their rights and obligations under these agreements.
61. **The Commission recommends** that prior to a declaration being made, traditional owners whose rights and interests may be affected by a proposed declaration are provided complete and clear information which outlines both the opportunities and the extent to which their rights will be restricted or impacted upon.
62. The Commission acknowledges that the *Cape York Peninsula Heritage Act 2007* provides for an Indigenous water reserve or allocation in each proposed declaration. This allocation is made for the purpose of helping Indigenous communities in the area achieve their economic and social aspirations.³²
63. The Commission also acknowledges that for the proposed declarations for the Stewart and Lockhart River Basins, the waters allocated to the Indigenous reserve are significantly higher than water allocated to the general and strategic reserves. The proposed declaration for the Archer River Basin also provides for a large allocation to the Indigenous reserve, which is equal to that allocated for the strategic reserve.
64. While unallocated waters in the general reserve may be made available for any purpose, waters in the Indigenous reserve that remain unallocated, are held specifically as Indigenous reserve for the purpose of helping Indigenous communities in the wild river area achieve their economic and social aspirations.³³
65. The Commission supports this as an important factor in maintaining the capacity for Indigenous peoples to realise and address their aspirations and their cultural obligations to their lands and waters.

³¹ Department of Natural resources and Water, *Wild Rivers Draft Indigenous summary guide*, p 4. At http://www.nrw.qld.gov.au/wildrivers/pdf/wr_indigenous_guide.pdf (viewed 12 November 2008).

³² *Cape York Peninsula Heritage Act 2007* s 27.

³³ Wild river declaration proposals, common Division 5 – Clause 17 (3).

66. In addition, unallocated waters in the general and strategic reserves³⁴ should also be made available to Indigenous people who are parties to IMA's to undertake joint management responsibilities directly related to managing the environment and the national parks, and where Indigenous peoples are undertaking ecotourism activities as provided for at Division 5, clause 17 of the proposed declarations of the Archer, Stewart and Lockhart River Basins. Water allocations in the Indigenous reserve should not be utilised for purposes already provided for in the strategic or general reserves.
- (ii) *Native Title, Land Rights and Cultural Heritage legislation*
67. The Commission notes that Indigenous peoples are concerned about the impact of the Wild Rivers Declarations on their native title rights and interests.³⁵
68. The Commission notes that section 44 of the Wild Rivers Act seeks to provide some protection of native title rights. It provides, in effect, that a wild rivers declaration or a wild rivers code, can not have the direct or indirect effect of limiting a person's right to the exercise or enjoyment of native title in as far as it prohibits or regulates the carrying out of activities and the taking of natural resources in a wild river area.
69. The State Government have advised that a declaration will not affect a native title claim process, the cultural heritage in a declared area, or the functioning of the *Aboriginal Cultural Heritage Act 2003*.³⁶ In particular, they assert that a declaration will not regulate or does not restrict traditional Indigenous activities such as camping, fishing, hunting and conducting traditional ceremonies and fire management, gathering plant materials and plant products, ochre and timber for traditional activities. However, there may be requirements under other Acts, such as the Vegetation Management Act.
70. **The Commission recommends** that in accordance with section 17 of the Wild Rivers Act³⁷, no declarations be made that impact upon Indigenous peoples' rights and interests that are already protected under the *Aboriginal Land Act 1991*, the *Native Title Act 1993 (Cth)*, the *Aboriginal Cultural Heritage Act 2003*, and the *Nature Conservation Act 1992 (Qld)*.
71. **Additionally the Commission recommends** that those rights and interests that have already been recognised or granted are not limited by the implementation of the Wild Rivers Act and declarations made in accordance

³⁴ The strategic reserve, means a reserve of water to be made available for developments of state or regional significance, town water supplies and for ecotourism. The general reserve, means a reserve of water to be made available for any purpose including the purposes of: agricultural activities, aquaculture or general industrial uses.

³⁵ R McConchie, Indigenous protest against Wild Rivers, 27 March 2007. At

<http://www.abc.net.au/rural/qld/content/2006/s1882886.htm> (viewed 13 November 2008).

³⁶ Department of Natural resources and Water, *Wild Rivers Draft Indigenous summary guide*, p 2. At http://www.nrw.qld.gov.au/wildrivers/pdf/wr_indigenous_guide.pdf (viewed 12 November 2008).

³⁷ Wild Rivers Act 2005, s 17, validates carrying out existing activities and the taking of natural resources that are authorised or permitted by a licence, permit, or approval document held by the person under another Act or law.

with it. This is specifically relevant to the protection of development aspirations on Indigenous lands and waters that have not yet commenced. Additionally, future rights and interests under the above acts must be afforded full protection.

(iii) *Racial Discrimination Act 1975 (Cth)*

72. The Queensland government should give very careful consideration to whether the proposed declarations may be invalid by operation of section 10 of the *Racial Discrimination Act 1975 (Cth)* (RDA). Such invalidity is raised by the significant potential of the declarations to impact upon a range of rights of Indigenous people.
73. Section 10 of the RDA is concerned with ensuring the equal enjoyment of rights of all persons under law.³⁸ It provides, relevantly:

10 Rights to equality before the law

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.³⁹

74. The Full Federal Court in *Bropho v Western Australia* ('*Bropho*')⁴⁰ summarised the operation of s 10(1) in the following way:

[Section] 10(1) of the [RDA] is engaged where there is unequal enjoyment of rights between racial or ethnic groups: see *Ward v Western Australia* (2002) 213 CLR 1. Section 10(1) does not require the Court to ascertain whether the cessation of rights is by reason of race, with the clear words of s 10 demonstrating that the inquiry is whether the cessation of rights is 'by reason of' the legislation under challenge. Further, s 10 operates, not merely on the intention, purpose or form of legislation but also on the practical operation and effect of legislation (*Gerhardy v Brown*, at 99; *Mabo v Queensland [No 1]* (1988) 166 CLR 186 at 230-231; *Western Australia v Ward* at 103).⁴¹

³⁸ *Gerhardy v Brown* (1985) 159 CLR 70 ('*Gerhardy*'), 99 (Mason J); *Western Australia v Ward* (2002) 213 CLR 1 ('*Ward*'), [105] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

³⁹ 'The Convention' is the International Convention on the Elimination of all Forms of Racial Discrimination opened for signature 21 December 1965 (entered into force 4 January 1969 except for art 14 which came into force 4 December 1982) (ICERD). ICERD entered into force for Australia on 30 October 1975 and art 14 with effect from 28 January 1993.

⁴⁰ [2008] FCAFC 100.

⁴¹ [2008] FCAFC 100 [73].

75. These submissions have highlighted the potential for the proposed declarations to impact disproportionately upon a range of rights of Indigenous people. These human rights include, but are not limited to, property rights.
76. The RDA has been held, in a number of cases, to protect Indigenous property rights, most obviously native title rights (which are also given some protection by s 44 of the Wild Rivers Act, as noted above).⁴² However, the Commission notes that the types of property rights protected by the RDA should be considered very broadly. In *Bropho*, the Full Federal Court held that the property rights protected by s 10(1) are not limited to rights of ‘ownership of a kind analogous to forms of property which have been inherited and adapted from the English system of property law or conferred by statute’.⁴³ In that case, the relevant property rights considered by the Court included the rights of Indigenous residents of a government reserve to manage the land.
77. The Commission notes that in *Bropho*, the Full Federal Court held that there will not be a breach of the RDA if rights are limited ‘in order to achieve a legitimate and non-discriminatory public goal’.⁴⁴ In determining what will constitute a ‘legitimate’ interference with rights, the following principles are relevant.
78. First, when determining the legitimacy of a limitation of a right, the assessment is an objective one – it is not sufficient, for example, that the parliament lacked a discriminatory motive or intention.
79. Second, proportionality will be a vital factor in making assessments of what is ‘legitimate’ – a measure will not be legitimate if its impact upon rights is disproportionate to the claimed purpose or benefit of the measure. In the present case, it is particularly relevant to ask whether the proposed declarations can reasonably be said to involve the least possible interference with the various rights of Indigenous people that are impacted upon by the proposed declarations.

5.3 *Effective engagement and participation with Indigenous peoples*

80. Whilst the Government and the Minister have noted that ‘in particular the legitimate interest of traditional owners will be recognised and taken into account’⁴⁵ when declaring rivers and their interconnected waterways, there is little acknowledgement of the ongoing land and water management undertaken by Traditional Owners for thousands of years.

⁴² See, for example, *Ward* above n 38; *Mabo v Queensland* (1988) 166 CLR 186.

⁴³ [2008] FCAFC 100, [79].

⁴⁴ [2008] FCAFC 100, [83]. Note, however, that an application for special leave to appeal against this decision is pending in the High Court.

⁴⁵ Premier the Honourable Anna Bligh, Bligh Govt Nominates Protection for the Three New Wild Rivers, Media Release, 22 June 2008.

81. All rights to the use, flow and control of all water in Queensland are currently vested in the State⁴⁶ who also have responsibility for the management of water.
 82. Traditional Owners of the Archer, Stewart and Lockhart River Basins have voiced their concerns that the rivers have not been adequately managed by the Government. This is evidenced by the visible impacts of feral animals and weeds and commercial fishing in the Archer River.
 83. As identified by the Wilderness Society, the government has a positive responsibility in natural resource management to protect Indigenous access and incorporate Indigenous values into management⁴⁷.
 84. In accordance with human rights principles, Indigenous peoples must be actively engaged in all levels of management and decision-making that directly or indirectly impacts their livelihoods. Effective participation in decision making is essential to ensuring non-discriminatory treatment and equality before the law
 85. Article 32 of the Declaration on the Rights of Indigenous Peoples specifies that:
 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
 2. States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water, or other resources.
 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.⁴⁸
- (a) *Full free prior and informed consent*
86. The Commission notes that the Wild Rivers Act and the proposed declarations provides for community consultation about the proposed declarations or revocations made in accordance with the Act.⁴⁹

⁴⁶ *Water Act 2000* (Qld) s 19.

⁴⁷ The Wilderness Society and Queensland Conservation Council, *Caring for Queensland's Wild Rivers: Indigenous rights and interests in the proposed Wild Rivers Act*, p 8. At <http://www.indig-enviro.asn.au/Indigenous%20interests%20in%20Wild%20Rivers.pdf> (viewed 11 November 2008)

⁴⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, Arts 32.

⁴⁹ Wild Rivers Act 2005, s12 (1)(t), and wild river declaration proposals, common Clause 4.

87. Section 13(1)(a) of the Wild Rivers Act states that the Minister must consider the results of community consultation on the declaration proposal and submissions made.
88. The Commission is concerned that the discretion that the Minister has to declare or revoke a declaration of a river, is based only on consultation and does not require the free prior and informed consent of the traditional owners.
89. Free, prior and informed consent is an internationally recognised principle applied to the development of legislative and policy frameworks that affect Indigenous peoples' rights to enjoy their land.⁵⁰ Free, prior and informed consent is more than consultation and participation. While consultation provides for the exchange and sharing of information, devoid of a decision-making role, consent means to permit, approve, or agree.
90. This principle applies not only to administrative acts and decisions about land use, but also to the legislative process itself.
91. The principle of free, prior and informed consent requires:
 - a. no coercion or manipulation used to gain consent
 - b. consent must be sought well in advance of authorisation by the State or third parties for activities to commence, or legislation to be implemented that affects the rights of Indigenous peoples
 - c. full and legally accurate disclosure of information relating to the proposal is provided in a form that is understandable and accessible for communities and affected peoples
 - d. communities and affected peoples have meaningful participation in all aspects of assessment, planning, implementation, monitoring and closure of a project
 - e. communities and affected peoples are able to secure the services of advisers, including legal counsel of their choice and have adequate time to make decisions
 - f. consent applies to a specific set of circumstances or proposal, if there are any changes to this proposal or to the circumstances this will renew the requirement for free, prior, and informed consent
 - g. consent includes the right to withhold consent and say no to a proposal.

⁵⁰ United Nations Economic and Social Council, Permanent Forum on Indigenous Issues "*Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*" 17-19 January 2005, <<http://daccessdds.un.org/doc/UNDOC/GEN/N05/243/26/PDF/N0524326.pdf?OpenElement>> (Accessed 21 November 2008).

92. Free, prior and informed consent secures the rights of Indigenous peoples to control access to their land, share the benefits resulting from the use of the land and procure compensation for the loss of resources.⁵¹
93. The United Nations Commission on Human Rights provides that:
- Free, prior and informed consent recognises Indigenous peoples' inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them, based on the principle of informed consent'.⁵²
94. In order for the requirement of informed consent to be achieved, Indigenous peoples must be fully engaged as equal stakeholders. This means that they must be fully apprised of the benefits and the costs resulting from legislative and policy developments, or negotiated agreements. This requires access to information and advice that is understandable and accessible for communities and affected peoples.
95. For example, the Commission is concerned that despite the intention to preserve the natural values of rivers in the Archer Basin, the proposed Archer River Basin declaration does not mention the exceptions afforded to the Aurukun Bauxite Project. It would be difficult for Indigenous and other interest groups to effectively engage in the consultation process and give their free, prior and informed consent, when the traditional owners groups may be unaware of the relative disadvantages in the proposed declarations.
96. **The Commission recommends** that in the implementation of the Wild Rivers Act and the development of any proposed declaration in accordance with the Act, the State ensures as a minimum standard:
- a. the effective participation of Indigenous peoples in the development of policies that affect Indigenous peoples' lands and waters
 - b. the adoption and compliance with the principle of free, prior, and informed consent for proposals on our lands and waters
 - c. evidence based policy with built in evaluation mechanisms
 - d. that legislative developments do not remove or restrict existing rights
 - e. non-discrimination and substantive equality.
97. **The Commission further recommends** that there be Indigenous involvement in the drafting and development of the proposed declarations made in accordance with the Act, and that the State build strong partnerships with Indigenous peoples for the joint management of the declared rivers.

⁵¹ World Resources Institute "Empowering Communities Through Free, Prior and Informed Consent" <<http://www.wri.org/publication/content/8082>> (Accessed 21 November 2008)

⁵² United Nations Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, Twenty-second session, 19 -13 July 2004, p.5.

5.4 Economic Development

98. The Commission is concerned that some aspects of the proposed declarations under the Wild Rivers Act may limit the rights of the traditional owners of the Archer, Lockhart and Stewart River Basins to economic development.
99. In particular, the Commission is concerned that proposed declarations have the potential to limit opportunities available to Indigenous people to develop sustainable local and regional economies based on the resources (including the cultural resources) of the lands and waterways. Consequently Indigenous peoples' right to self-determination may be undermined.
100. For example, the Commission is concerned that while proposed declarations in the Archer Basin may disadvantage Indigenous communities by effectively prohibiting various opportunities to develop land in the proposed preservation areas such as agriculture, and surface mining, it may allow for damaging, large-scale mining activities to continue.
101. The Commission notes that further provisions or exemptions may be required to strengthen the ability of Indigenous peoples to protect their economic rights derived from their lands, waters, and natural resources; and to conduct activities that ensure their development aspirations are fulfilled within the Archer, Lockhart and Stewart River Basins.
102. The Commission notes that of the overall commitment of the State to employ 100 Indigenous Wild Rivers Rangers, to date only 20 Indigenous rangers have been employed in Wild Rivers Areas across the Gulf and Cape regions. The Commission also acknowledges that the target of 100 Rangers is a longer-term goal. The Government have provided \$2.8 million in the 2008/09 State budget for this purpose.⁵³
103. **The Commission recommends** the Government assure the long term resourcing for the management of Wild Rivers. This must include funding for full time Indigenous rangers and co-ordinators to manage the waters and lands, and also provide for the necessary infrastructure, capacity building and training required to support the management of the rivers.
104. The Commission has a number of concerns related to the prohibition of certain activities under the proposed declarations and in accordance with the Wild Rivers Code. This includes:
- (a) *Aquaculture*
105. The Commission is concerned that the prohibition on new aquaculture development⁵⁴ in high preservation areas will impact upon Indigenous peoples' right to economic development in their waters.

⁵³ Premier the Honourable Anna Bligh, Bligh Govt Nominates Protection for the Three New Wild Rivers, Media Release, 22 June 2008.

⁵⁴ Part 2, Wild Rivers Code

106. The prohibition on aquaculture in the Lockhart River Basin might stifle potential economic opportunities available in the cultivation of live fisheries resources, particularly for Indigenous peoples whose country is in estuaries and river mouths.

(b) *Vegetation*

107. The Commission is concerned that the requirements in the declarations for vegetation clearing in a high preservation area may impact upon Indigenous peoples' right to economic development. In particular, this provision relates to the requirement for a permit⁵⁵ to clear vegetation in both high preservation areas and preservation areas. The Commission is concerned that this might place substantial restrictions on clearing vegetation to build tourism infrastructure, outstations, and for agriculture and cultural purposes.

108. The Commission notes that there is currently uncertainty about the commercial harvesting of vegetation in a high preservation area (such as river reeds at Aurukun) for the use in traditional art and craft or to produce goods for sale.

109. The Commission submits that there should not be unnecessary limitations on harvesting and clearing of vegetation for traditional owners. The use of vegetation such as reeds in art and craft are traditional activities, recognised as a native title right and interest and offers potential economic development opportunities.

(c) *Market Gardens*

110. While it is permissible for Indigenous peoples to grow agricultural produce in high preservation areas for personal consumption, growing agricultural produce in market gardens in high preservation areas for sale in local communities and stores requires a development application⁵⁶.

111. This places undue restrictions on small-scale commercial agriculture that is similar to domestic agriculture for personal consumption. The Commission is concerned that the relationship between the sale of produce resulting from a market garden and the protection of the rivers natural values is not clear. The Commission is also concerned that this will impede Indigenous rights to sustainable economic development opportunities in their lands and waters.

(d) *Specified works such as boat ramps and jetties*

112. Part 3 of the Wild River Code allows for boat ramps and jetties for public use⁵⁷ to be assessable as development, and for which a development application can be made in high preservation areas. This implies that there is a prohibition or a more onerous process involved in building private boat ramps and jetties. This has the potential to impede upon Indigenous peoples' opportunities to

⁵⁵ Part 12, Wild Rivers Code

⁵⁶ Part 1, Wild Rivers Code.

⁵⁷ "Specified works" in the *Wild Rivers Act 2005* (Qld) refer to public boat ramps and jetties.

engage in tourism activities, to transport agricultural produce, and to access their homelands. This will be particularly relevant during the wet season where the only mode of transport in many of the regions covered by the proposed declarations is by boat due to flooding.

113. Additionally, the Commission is concerned that as provision is made only for the public use boat ramps and jetties, it might not be acceptable to Indigenous peoples whose lands are on Indigenous freehold and should not be publicly accessible without the traditional owners' permission.
114. **Finally, the Commission recommends** that the Government fully recognise the significance of the River Basins to the Traditional Owners whose lands lie within the Archer, Stewart and Lockhart River Basins. The Commission also recommends that the government take this opportunity to incorporate Indigenous peoples distinct rights to water, the environment, economic development and participation and engagement into the proposed Archer, Stewart and Lockhart River Basin declarations.